



**WHAT A DIFFERENCE A JUSTICE MAKES
A REVIEW OF THE 2006-2007 SUPREME COURT TERM:
THE IMPACT OF JUSTICES ROBERTS AND ALITO ON THE BENCH**

The American people deserve fair courts and independent judges that help ensure the protection of vital rights and freedoms. Instead, what they have gotten from President Bush is appointments of ultra-conservative judges who have rolled back the progress of recent decades in protecting individual liberties and fundamental constitutional rights.

When President Bush had the opportunity to nominate Supreme Court justices, he selected two who had records that raised serious questions about their ability to be independent and concerns about their lack of respect for individual liberties and rights. Justices Alito and Roberts have done nothing to disappoint the president who appointed them. Now, after their second term on the Court, the confirmations of John Roberts and Samuel Alito show how critical it is for senators to understand the implications of confirming judges whose records demonstrate that they will move the law sharply to the right.

A review of the decisions issued during the 2006-2007 Supreme Court term expands on what we saw in the 2005-2006 term – a lack of respect for precedent, a rolling back of numerous constitutional protections, and Supreme Court justices ignoring the promises they made at their Senate hearings and, instead, following their records on key issues ranging from abortion to environmental protection to First Amendment rights.

I. Actions Speak Louder Than Words

At the confirmation hearings of Chief Justice Roberts and Justice Alito, members of the Senate Judiciary Committee had a chance to ask tough questions and delve into the nominees’ records. What they got in response was mainly vague answers and avoidance despite the fact that both nominees had taken positions on many key issues in the past. And, as justices on the Court, their rulings are consistent with their records. Both John Roberts and Samuel Alito continued on the path they were on as political appointees in Republican administrations and put their personal politics ahead of following the law.

<p>WHAT HAPPENED THIS TERM IN THE SUPREME COURT</p>	<p>WHAT JUSTICES ROBERTS AND ALITO TESTIFIED AT THEIR CONFIRMATION HEARINGS</p>	<p>WHAT JUSTICES ROBERTS’ AND ALITO’S RECORDS SHOWED</p>
<p><i>Gonzales v. Carhart:</i> The Court upheld the Partial Birth Abortion Ban Act which makes no exception to preserve the health of the woman. Chief Justice Roberts and Justice Alito joined the 5-4 majority.</p>	<p><i>Chief Justice Roberts:</i> “<i>Roe v. Wade is the settled law of the land. There’s nothing in my personal views that would prevent me from fully and faithfully applying that precedent, as well as Casey.</i>”</p> <p><i>Justice Alito:</i> “<i>I think that the case law is very clear that protecting the life and the health of a mother is a compelling interest throughout pregnancy. I think that's very clear in the case law.</i>”</p>	<p><i>Chief Justice Roberts:</i> As a political appointee in the Reagan and Bush administrations, Roberts denounced the right of privacy. He co-authored a brief stating that “Roe was wrongly decided and should now be overruled.”</p> <p><i>Justice Alito:</i> As a lawyer in the Reagan administration, Alito expressed his personal belief that the Constitution doesn’t protect the right to abortion and he advocated a strategy of eventually overturning Roe while “in the mean time mitigating its effects.” As an appeals court judge, he would have upheld a spousal consent law that was ultimately struck down by the Supreme Court.</p>

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<p><i>Parents Involved in Community Schools v. Seattle School District #11; Meredith v. Jefferson County Board of Education:</i> Chief Justice Roberts authored an opinion stating that race cannot be used as a factor in assigning children to particular public schools. Justice Alito joined the 5-4 majority.</p>	<p><i>Chief Justice Roberts:</i> <i>Brown v. Board of Education</i> “changed the course of American history” and put the Supreme Court “in the role of vindicating the vision of justice that the framers enacted in the Constitution.”</p> <p><i>Justice Alito:</i> <i>Brown</i> was “one of the greatest, if not the single greatest thing, that the Supreme Court of the United States has ever done.”</p>	<p><i>Chief Justice Roberts:</i> As a lawyer in the Reagan administration, Roberts defended the Reagan administration’s anti-desegregation policy, writing, “Experience has demonstrated that [forced racial] busing does not promote desegregation but actually increases racial imbalance by causing many parents who can afford to do so to take their children out of the public schools,” and “busing promotes segregation rather than remedying it, by precipitating white flight...it is within Congress’ authority to determine that busing is counterproductive and to prohibit federal courts from ordering it.” As a lawyer in the Solicitor General’s Office, Roberts co-authored two amicus briefs arguing in favor of limiting court-ordered desegregation plans.</p> <p><i>Justice Alito:</i> As a lawyer in the Reagan administration, Alito opposed race-conscious policies saying he was “particularly proud” of his efforts to squelch affirmative action policies.</p>

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<p>Massachusetts v. EPA: The Court required the EPA to regulate global warming-inducing greenhouse gases. Chief Justice Roberts and Justice Alito dissented in the 5-4 decision saying that none of the parties bringing the case had “standing,” or the right to sue in court.</p>	<p>Chief Justice Roberts: <i>“Environmental interests...are all protected under the law [and] standing can encompass, certainly, environmental harms.”</i></p> <p>Justice Alito, asked his opinion of Friends of the Earth v. Laidlaw in which the Supreme Court ruled that plaintiffs did not need to prove an actual harm to residents: <i>“Laidlaw is a precedent on the Supreme Court. And my answer to the question there is the same: It is entitled to the respect of stare decisis.”</i></p>	<p>Chief Justice Roberts: As a lawyer in the Reagan Administration, Roberts argued that the Justice Department was “not raising standing challenges in the most vigorous fashion,” and that “[t]his was particularly true in the environmental area.” As a lawyer in the Bush administration, Roberts pursued a policy of seeking the dismissal of cases – particularly environmental cases – on standing grounds. In a 1993 law review article, Roberts defended the Bush administration’s restrictive view of environmental standing.</p> <p>Justice Alito: As an appeals court judge, Alito joined one of the harshest environmental standing decisions ever written, requiring individuals to show harm to the environment before being permitted to file suit.</p>

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<p><i>Ledbetter v. Goodyear Tire:</i> The Court set a 180 day filing deadline for employees to sue their employers for discrimination in pay, even if the discrimination was not immediately apparent to the worker and even if the effects (lower pay) continue to the present day. Justice Alito authored the opinion and Chief Justice Roberts joined the 5-4 majority.</p>	<p><i>Chief Justice Roberts:</i> “<i>Of course gender discrimination is a serious problem. It's a particular concern of mine and always has been. I grew up with three sisters, all of whom work outside the home. I married a lawyer who works outside the home. I have a young daughter who I hope will have all of the opportunities available to her without regard to any gender discrimination.</i>”</p>	<p><i>Chief Justice Roberts:</i> As a lawyer in the Reagan White House, Roberts disparaged what he called “the purported gender gap.” In internal memos, Roberts urged President Reagan to refrain from embracing any form of the proposed Equal Rights Amendment (ERA) pending in Congress [and] he concluded that some state initiatives to curb workplace discrimination against women relied on legal tools that were “highly objectionable.” In a 1983 memo, Roberts criticized a California proposal to require women to be paid the same as men for state jobs considered of comparable worth.</p> <p><i>Justice Alito:</i> As an appeals court judge, Alito, in five split decisions involving a claim of sex discrimination, sided with the defendant every time.</p>

II. A Far Cry From Justice O'Connor

Justice Alito replaced Justice O'Connor on the bench amidst much complacency on the part of the Senate. Now, a review of Justice Alito's decisions on the Court show what a difference one justice can make.

Reproductive Rights:

- In 2000, in *Stenberg v. Carhart*, with Justice O'Connor casting the deciding vote, the Supreme Court held that where a woman's health might be endangered by an abortion restriction, it must contain an exception to protect her well-being.
- In 2007, in *Gonzales v. Carhart*, with Justice Alito casting the deciding vote, the Supreme Court upheld the Partial Birth Abortion Ban Act which outlaws the procedure and does not include a health exception.

Affirmative Action:

- In 2003, in *Grutter v. Bollinger*, with Justice O'Connor casting the deciding vote, the Supreme Court ruled that affirmative action policies in higher education could be constitutional.
- In 2007, in *Parents Involved in Community Schools v. Seattle School District #11* and *Meredith v. Jefferson County Board of Education*, Justice Alito joined Chief Justice Roberts in seeking to invalidate race as a factor in assigning children to particular public schools.

Women's Rights:

- In 1996, in *U.S. v. Virginia*, Justice O'Connor joined the majority opinion which concluded that the government cannot rely on "overbroad generalizations" about the "talents, capacities, or preferences" of women.
- In 2007, in *Gonzales v. Carhart*, with Justice Alito casting the deciding vote, the Court's rationale included the idea that women need to be saved from their own bad decisions – that, as the dissent points out, "women who have abortions come to regret their choices."

III. A Record of Dismantling Important Precedents: *Stare Decisis* Goes by the Wayside

In their Senate confirmation hearings, John Roberts and Samuel Alito testified repeatedly about the critical importance of precedent and promised to abide by *stare decisis*. However, in the most controversial decisions issued this term, with a 5-4 majority, they undermined years of precedent on landmark rulings that have advanced social progress.

Chief Justice Roberts at his confirmation hearing...

- “[T]here’s nothing in my personal views based on faith or other sources that would prevent me from applying the precedents of the court faithfully under principles of *stare decisis*.”
- “Adherence to precedent promotes evenhandedness, promotes fairness, promotes stability and predictability. And those are very important values in a legal system.”
- “Judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath.”
- “[T]he principles of *stare decisis* are neutral and should be applied in a neutral way to cases, without regard to the substance of the decisions being considered.”
- “I have told people, when pressed, that I prefer to be known as a modest judge. ...Another part of that humility has to do with respect for precedent that forms part of the rule of law that the judge is obligated to apply under principles of *stare decisis*.”
- “I can give the commitment that I appreciate that my role as a judge is different than my role as a staff lawyer for administration. As a judge, I have no agenda. I have a guide in the Constitution and the laws and the precedents of the court and those are what I would apply with an open mind, after fully and fairly considering the arguments and assessing the considered views of my colleagues on the bench.”

Justice Alito at his confirmation hearing...

- “It is the presumption that the court will follow its prior precedents.”
- “[Precedent is] important because it reflects the view that courts should respect the judgments and the wisdom that are embodied in prior judicial decisions.”
- “Well, I think the doctrine of *stare decisis* is a very important doctrine. It's a fundamental part of our legal system. And it's the principle that courts in general should follow their past precedents. And it's important for a variety of reasons. It's important because it limits the power of the judiciary. It's important because it protects reliance interests. And it's important because it reflects the view that courts should respect the judgments and the wisdom that are embodied in prior judicial decisions.”
- “[A] judge has to follow the law. An important part of the law in this area, as we look at it in 2006, is the law of *stare decisis*.”
- “*Stare decisis*, which I was talking about earlier, is an important limitation on what the Supreme Court does.”
- “We have our own precedents. And we should look to that in interpreting our Constitution.”

Chief Justice Roberts and Justice Alito on the Supreme Court...

- ***Gonzales v. Carhart***: Failed to follow precedent of *Stenberg v. Carhart*, which required protection for a woman's health in any abortion restrictions.
- ***Parents Involved in Community Schools v. Seattle School District #11; Meredith v. Jefferson County Board of Education***: Failed to follow precedent of *Grutter v. Bollinger*, which upheld the use of race as a factor in policies achieving the compelling state interest of diversity in education.
- ***Hein v. Freedom from Religion Foundation***: Failed to follow precedent of *Flast v. Cohen*, which allowed taxpayers to sue the government for unconstitutionally spending funds for religious purposes in violation of the First Amendment's Establishment Clause.
- ***Morse v. Frederick***: Failed to follow precedent of *Tinker v. Des Moines Independent Community School District*, which ensured the protection of the free speech rights of public school students.

IV. Conclusion: Where Do We Go From Here?

In 1986, as a lawyer in the Reagan White House, Supreme Court nominee John Roberts provided his view on the Senate's role in the Supreme Court confirmation process. He wrote, "The Senate is free under the Constitution to consider whatever it cares to consider in voting on a nominee." And, Chief Justice Roberts' predecessor and mentor, Chief Justice William Rehnquist, agreed when he said in a 1987 speech at Columbia University School of Law that it is appropriate for the Senate to inquire into the "judicial philosophy" of a Supreme Court nominee - - such an inquiry "has always seemed...entirely consistent with our [C]onstitution and serves as a way of reconciling judicial independence with majority rule."

Senator Kennedy (D-MA), in a July 30, 2006 *Washington Post* op-ed, laid out proposed reforms for the confirmation process that includes the Senate having the same access to the nominee's writings as the administration and a reorganization of the way the Senate Judiciary Committee asks questions to shift the inquiry from short rounds of questions to more in-depth questioning. What is crucial is that there is a process that allows senators – both on the Judiciary Committee and in the full Senate – to have the information needed to fulfill their constitutional duty of “advise and consent.” And in fulfilling that duty, the Senate must and can do better.

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